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Nos. 03-960 and 03-968

In the Supreme Court of the United States

GROSS SEED COMPANY, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

SHERBROOKE TURF, INC., PETITIONER

v.

MINNESOTA DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the race-conscious provisions of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107, and the Department of Transportation's revised implementing regulations, 49 C.F.R. Pt. 26 (2000), are constitutional.

2. Whether the court of appeals correctly held that Nebraska's and Minnesota's race-conscious Disadvantaged Business Enterprise Programs, implemented pursuant to TEA-21 and the Department of Transportation's regulations, are constitutional.

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OPINIONS BELOW

The opinion of the court of appeals (03-960 Pet. App. 1a-14a; 03-968 Pet. App. 1a-17a) is reported at 345 F.3d 964. The opinions of the district courts in No. 03-960 (Pet. App. 15a-27a) and No. 03-968 (Pet. App. 18a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2003. The petitions for a writ of certiorari in

No. 03-960 and No. 03-968 were filed on December 30, 2003, and December 31, 2003, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

These cases arise out of Congress's longstanding efforts to distribute federal highway construction and transit funds, and the opportunities created by those funds, in a manner that does not reflect or reinforce prior and existing patterns of discrimination on the basis of race and gender in those industries. They involve facial and as-applied constitutional challenges to the Transportation Equity Act for the 21st Century (TEA-21), the United States Department of Transportation (DOT) regulations implementing TEA21, and the States of Nebraska's and Minnesota's Disadvantaged Business Enterprise (DBE) Programs implementing TEA-21 and DOT's regulations.

1. a. Section 1101 of TEA-21, Pub. L. No. 105-178, 112 Stat. 111, and DOT's revised implementing regulations, 49 C.F.R. Pt. 26 (2000), are designed to remedy the effects of racial and sex discrimination in highway contracting and to ensure that federal dollars do not reinforce such discrimination.[1] The Act and DOT regulations authorize States and other recipients of federally-aided highway and transit projects to use race- conscious contracting remedies for socially and economically disadvantaged business enterprises. They require state and local governmental entities, as a con-

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[1] Section 1101(b)(1) states "Except to the extent that the Secretary [of Transportation] determines otherwise, not less than 10 percent of the amounts made available for any program under titles I, III, and V of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." 112 Stat. 113.

dition of receiving federal financial assistance for highway construction, to develop and implement DBE programs consistent with federal statutory and regulatory specifications.[2]

In 1995, in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (*Adarand I*), this Court considered an equal protection challenge to the federal DBE program enacted pursuant to TEA-21's predecessor statute. The Court held that the DBE program, as well as all other federally imposed race-conscious measures, must be evaluated under a strict scrutiny standard. As a result, in 1998, Congress debated whether it should reauthorize the DBE program. During those debates, both houses of Congress considered and soundly rejected, by bipartisan votes, two amendments that would have eliminated the DBE program. 144 Cong. Rec. 2797, 5565 (1998).

b. Prior to enacting TEA-21, Congress had evidence that DBEs continue to suffer the effects of discrimination that adversely affect their ability to participate on an equal opportunity basis in highway construction. The legislative record includes anecdotal evidence of

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[2] TEA-21 was initially set to expire on September 30, 2003. It has been extended twice while Congress has debated its reauthorization. The current extension will expire on April 30, 2004. See Surface Transportation Extension Act of 2003, Pub. L. No. 108-88, 117 Stat. 1110 (extending TEA-21 to February 29, 2004); Surface Transportation Extension Act of 2004, Pub. L. No. 108-202, 118 Stat. 478 (extending TEA-21 to April 30, 2004). Both the House and Senate have passed reauthorization legislation with identical language, although the duration of the reauthorization has yet to be determined. See Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004, S. 1072, 108th Cong., 2d Sess. § 1821 (Feb. 26, 2004); Transportation Equity Act: A Legacy for Users, H.R. 3550, 108th Cong., 2d Sess. § 1101(b) (Apr. 2, 2004).

intentional discrimination in awarding of subcontracts; pay disparities not explained by other factors; discrimination by non-governmental actors in the provision of business loans and bonding; and the adverse consequences of an "old boy" network that effectively excludes many minorities and women. See, *e.g.*, 144 Cong. Rec. at 2685, 2689-2690, 2699, 2706-2708; see also 64 Fed. Reg. 5100-5102 (1999) (summarizing). For example, a study of the construction industry supported by the United States Bureau of the Census and National Science Foundation found that "blacks, controlling for borrower risk, are less likely to have their business loan applications approved than other business owners," and generally receive smaller loans when approved. C. Grown & T. Bates, *Commercial Bank Lending Practices and the Development of Black Owned Construction Companies*, 14 J. Urb. Aff. 25-26, 39 (1992) (discussed by Rep. Norton, 144 Cong. Rec. at 10,656-10,657). Similarly, a 1997 survey of 58 state and local studies of disparity in government contracting found that "African Americans with the same level of financial capital as whites receive about a third of the loan dollars when seeking business loans." See M. Enchautegui et al., *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* 36 (1997) (*Urban Inst. Rep.*) (discussed by Rep. Norton, 144 Cong. Rec. at 10,657-10,658). In addition, the legislative record includes numerous accounts detailing specific instances of discrimination against DBEs[3] as well as statistical data

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[3] See, *e.g.*, *Availability of Credit to Minority-Owned Small Businesses: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking, Finance, and Urban Affairs*, 103d Cong., 2d Sess. 20 (1994); 144 Cong. Rec. at 2706-2708; *Unconstitutional Set-Asides: ISTEA's Race-Based Set-Asides After Adarand: Hearing*

and studies detailing varying amounts of underutilization of black, Hispanic, Asian, and Native-American owned businesses in government contracting.[4]

2. During the debates on TEA-21, members of Congress were aware that DOT, in response to this Court's *Adarand* decision, was substantially revising its regulations to help ensure that its DBE program satisfied strict scrutiny. 144 Cong. Rec. at 2685-2686, 2700-2702, 2708; *id.* at 2785-2787; *id.* at 10,370- 10,371. See, *e.g.*, H.R. Rep. No. 550, 105th Cong., 2d Sess. 4009-4010 (1998) ("The Department of Transportation is reviewing the DBE program in light of recent court rulings and has proposed new regulations to ensure that program withstands constitutional muster."). DOT issued those new regulations in February 1999. 49 C.F.R. Pt. 26 (2000).

DOT's revised DBE regulations require recipients of federal highway funds to adopt a DBE program and submit it to DOT for review and approval. DOT, consistent with TEA-21 (§ 1101(b)(2)(B), 112 Stat. 113), employs the definitions of "social[]" and "economic[]" disadvantage contained in the Small Business Act (SBA), 15 U.S.C. 631 *et seq.* Applicants are considered socially and economically disadvantaged if they have been "sub-

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Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary, 105th Cong., 1st Sess. 55-56, 58-59, 64, 69, 74-76, 120 (1997) (*1997 ISTEA Hearing*).

[4] See, *e.g.*, *Urban Inst. Rep.* 11, 14-15, 19-22, 61; 144 Cong. Rec. at 10,371; *id.* at 2679-2680, 2699, 2794; Office of Advocacy, SBA, *The State of Small Business: A Report of the President* 1995 at 323 (1996); DOT, State of Colorado, *Disparity Study Final Report* (Apr. 1, 1998) (cited by Sen. Chaffee, 144 Cong. Rec. at 10,371); 2 State of Louisiana, *Disparity Study* 204-205 (June 1991) (cited by Sen. Kennedy, 144 Cong. Rec. at 2782). See also *1997 ISTEA Hearing* 55-56, 58-59, 64, 69, 74-76, 120.

jected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," 15 U.S.C. 637(a)(5), *and* their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6)(A). Under Section 637(d)(3)(C)(ii) of the Small Business Act, African-Americans, Native-Americans, Asians and Hispanics are deemed presumptively economically and socially disadvantaged. Section 1101(b)(2)(B) of TEA-21 also deems women presumptively economically and socially disadvantaged. 112 Stat. 113.

DOT's revised DBE regulations employ enhanced regulatory safeguards to help ensure that only firms owned and controlled by individuals who are in fact socially and economically disadvantaged participate in a DBE program. Owners of firms applying for DBE certification, including those who are by statute deemed presumptively disadvantaged, must submit a signed and notarized statement saying that they are socially and economically disadvantaged and must disclose their personal net worth with appropriate documentation. 49 C.F.R. 26.67(a)(1) and (2)(i). If the individual's personal net worth exceeds $750,000 (excluding the value of the individual's home and equity in the business seeking certification), the presumption of economic disadvantage is conclusively rebutted and the individual is not eligible for certification in a DBE program. 49 C.F.R. 26.67(b)(1). The regulations further provide that (a) any person may challenge whether a specific DBE owner is in fact socially and economically disadvantaged, 49 C.F.R. 26.87; (b) a recipient of DOT financial assistance may at any time commence a proceeding to

rebut the presumption of disadvantage with respect to any individual, 49 C.F.R. 26.67(b)(2); and (c) DOT "may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program." 49 C.F.R. 26.107(e).

To help ensure that the use of race- and gender-conscious remedies for the effects of discrimination are tailored to local conditions, the regulations state that the recipient's overall annual goal for DBE participation must be "based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on DOT-assisted contracts" and that the "goal must reflect [the state or other federal funding recipient's] determination of the level of DBE participation [the recipient] would expect *absent the effects of discrimination*." 49 C.F.R. 26.45(b) (emphasis added). This two-step overall goal setting process begins with a determination of a base figure for relative DBE availability. 49 C.F.R. 26.45(c). States can choose from among several approaches, or a combination of approaches, for determining the base figure, including DBE directories and Census Bureau data, bidders lists, data from disparity studies, goals of another recipient in a substantially similar market, or any other methodology based on demonstrable evidence of local market conditions. 49 C.F.R. 26.45(c)(1)-(5). Next, recipients must determine what adjustments, if any, should be made to the base figure, based on an examination of all the evidence available in a jurisdiction, to arrive at the overall DBE participation goal. 49 C.F.R. 26.45 (d). The regulations also state that a recipient is not to be penalized simply

for failing to meet its annual overall DBE participation goal. 49 C.F.R. 26.41, 26.47.

The regulations prohibit the use of quotas and permit set-asides only in the most egregious instances of otherwise irremediable discrimination. 49 C.F.R. 26.43; 64 Fed. Reg. at 5107-5108. In addition, they require recipients to meet the maximum feasible portion of their DBE participation goal through race- and gender-neutral means. 49 C.F.R. 26.51(b). Race- and gender-conscious measures may be used *only* if race- and gender-neutral means will not permit achievement of the established goals, 49 C.F.R. 26.51(d), and recipients must discontinue use of all race- and gender-conscious measures if, at any point, it appears that they can achieve the DBE goal entirely through race-neutral means. 49 C.F.R. 26.51(f)(1). The DOT regulations also require that a prime contractor that demonstrates good-faith efforts in achieving DBE participation must be awarded a contract even if it fails to meet a specific DBE participation goal. 49 C.F.R. 26.53(a).

3. a. The Nebraska Department of Roads (NDOR) receives federal aid pursuant to TEA-21 for the construction of highways. To comply with TEA-21 and DOT's DBE regulations, NDOR analyzed conditions within the local highway construction market relating to DBE participation. As one method of complying with Section 26.45(c), NDOR utilized bid data to calculate the relative availability of DBEs in the local market by comparing the total number of ready, willing and able DBEs to all contractors. Then, in accordance with 49 C.F.R. 26.51(c), NDOR estimated the level of DBE participation that could be achieved with race- and gender-neutral measures by examining DBE participation levels in highway construction contracts with and without race-conscious goals. Based on this evidence,

NDOR set an overall annual goal for DBE participation of 11% for fiscal year 2000, and reduced it to 9.95% for 2001, of which it determined that 2.33% and 5.13%, respectively, could be achieved through race- and gender-neutral means. 03-960 Pet. App. 14a, 18a; 03-960 Pet. 9-10.

In March of 2000, DOT reviewed NDOR's then-current DBE program and determined that it complied with DOT's regulations. Although DOT does not specifically review every substantive decision made by a state implementing a DBE program, it did conclude that NDOR's goal-setting methodology satisfied the procedures set forth in 49 C.F.R. 26.45(f)(3) and that there was a valid basis under federal regulations for NDOR's adoption of its annual goals for fiscal years 2000 and 2001.

b. Petitioner Gross Seed specializes in landscaping and regularly bids on federally-assisted highway construction contracts in Nebraska as a prime contractor or subcontractor. 03-960 Pet. App. 16a. In March 2000, it filed a complaint against the State of Nebraska, alleging that it was denied a subcontract on a project funded by TEA-21 because of Nebraska's DBE program. Petitioner charged, in both facial and as-applied challenges, that the DBE provisions in TEA-21, DOT's regulations, and Nebraska's DBE program violate the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Petitioner sought monetary, injunctive, and declaratory relief. The United States, DOT, and the Federal Highway Administration, a DOT agency, intervened. Petitioner filed an amended complaint against the federal and state defendants. *Id.* at 15a-19a.

The district court conducted a seven-day bench trial. The evidence included 174 exhibits, most of which were

documents from the legislative record, as well as testimony of federal and state government officials responsible for administering and implementing the federal and local DBE programs, individuals affected by those programs, and experts who analyzed the legislative record. 03-960 Pet. App. 15a-20a.

c. On May 6, 2002, the district court, applying strict scrutiny, held that TEA-21 and DOT's DBE regulations are constitutional on their face and that NDOR's DBE program is constitutional as implemented. 03-960 Pet. App. 22a, 27a. The court found that Congress had "a strong basis in evidence" to support its conclusion that remedial action was necessary. *Id.* at 23a. Based on its review of the legislative record, the district court concluded that the factual predicate was sufficient to justify the race-conscious measures authorized in TEA-21 because the evidence "demonstrate[s] * * * racial and gender discrimination within the construction industry" and "Congress, through extensive research and hearings, determined that race-neutral measures alone would not entirely remedy the problem of past discrimination." *Id.* at 24a.

The district court also found that the DOT's DBE regulations are narrowly tailored on their face. 03-960 Pet. App. 24a-26a. The court noted that the regulations (a) require recipients to "meet the maximum feasible portion of their overall goal by using race-neutral means" (*id.* at 24a), (b) exclude firms owned by individuals who have a net worth in excess of $750,000 (*id.* at 25a), (c) guarantee that a recipient's annual goal reflects local market conditions (*ibid.*), and (d) limit the impact on non-DBE firms by virtue of their "'good faith' provisions" and local assessment (*id.* at 26a). The court also noted that the program is of limited duration, as TEA-21 would expire in 2003. The district court

therefore concluded that NDOR's implementation of the Federal DBE program was constitutional. *Id.* at 26a-27a.

4. a. The Minnesota Department of Transportation (MNDOT) receives federal aid pursuant to TEA-21 for the construction of highways. To comply with TEA-21 and DOT's DBE regulations, MNDOT analyzed conditions within the local highway construction market relating to DBE participation. As one method of complying with Section 26.45(c), MNDOT utilized bid data to calculate the relative availability of DBEs in the local market by comparing the total number of ready, willing and able DBEs to all contractors. Then, in accordance with 49 C.F.R. 26.51(a), MNDOT estimated the level of DBE participation that could be achieved with race- and gender-neutral measures by contrasting DBE participation levels in highway construction programs with and without race-conscious goals. Based on this evidence, MNDOT set an overall annual goal for DBE participation of 11.6% for fiscal year 2001. Minnesota noted that, in 1999, when its DBE program had been enjoined, DBE participation was 2.25%. MNDOT, therefore, concluded that it could meet 2.6% of its annual goal through race-neutral means, and 9% of its goal through race-conscious means. DOT reviewed MNDOT's then-current DBE program and concluded that it complied with DOT's regulations. 03-968 Pet. App. 22a.

b. Petitioner Sherbrooke Turf specializes in landscaping and regularly bids on federally-assisted highway construction contracts in Minnesota as a subcontractor. 03-968 Pet. App. 18a. In April 2000, it filed a complaint in federal court against the State of Minnesota, alleging that it was denied a subcontract on a highway project funded by TEA-21 because of Minnesota's DBE program. Petitioner charged, in both facial

and as-applied challenges, that the DBE provisions in TEA-21, DOT's DBE regulations, and Minnesota's DBE program violate the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Petitioner sought injunctive and declaratory relief. The United States, DOT, and the Federal Highway Administration intervened. *Id.* at 18a-19a.

c. On November 15, 2001, the district court granted defendants' motions for summary judgment. Applying strict scrutiny, the court held that TEA-21 and DOT's DBE regulations were facially constitutional and that Minnesota's DBE program was constitutional as implemented. 03-968 Pet. App. 27a-37a.

5. The court of appeals consolidated the cases on appeal and affirmed in both cases. 03-960 Pet. App. 2a-14a. The court stated that it "conduct[ed] a de novo review of th[e] legislative record," and "t[ook] a hard look at the evidence," applied this Court's decisions, and concluded that "Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary." *Id.* at 7a (citing *Adarand* v. *Slater*, 228 F.3d 1147, 1167-1176 (10th Cir. 2000) (finding legislative record sufficient to uphold the facial constitutionality of TEA-21 and DOT's regulations), cert. granted in part, 532 U.S. 967, cert. dismissed as improvidently granted, 534 U.S. 103 (2001) (*Adarand II*)).

The court of appeals rejected petitioners' argument that Congress (and the Tenth Circuit in *Adarand II*) had erroneously relied only on a federal document that summarized evidence relating to the compelling interest supporting racial preferences in contracting, *The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26,050 (1996) (*Appendix*). The court stated, "Congress

has spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry," 03-960 Pet. App. 7a, and that petitioner failed to "present affirmative evidence" to rebut the extensive legislative record. *Ibid.*

The court of appeals also rejected petitioners' contention that Congress, in order to enact TEA-21, must have had "strong evidence of race discrimination in construction contracting *in Minnesota and Nebraska*" to enact national remedial legislation. 03-960 Pet. App. 8a. The court stated, "[w]hen the program is federal, the inquiry is (at least usually) national in scope. If Congress or the federal agency acted for a proper purpose and with a strong basis in the evidence, the program has the requisite compelling interest nationwide, even if the evidence did not come from or apply to every State or locale in the Nation." *Ibid.* The court of appeals further explained that it would consider petitioners' concern as to the alleged absence of discrimination in Nebraska and Minnesota in the context of its narrow tailoring analysis, holding that "a national program must be limited to those parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny. Thus, we leave this question of state implementation to our narrow tailoring analysis." *Id.* at 8a-9a.

The court of appeals then held that the federal DBE regulations are narrowly tailored on their face. The court emphasized that DOT's revised regulations place strong emphasis on the "use of race-neutral means to increase minority business participation in government contracting." 03-960 Pet. App. 11a (quoting *Adarand I*,

515 U.S. at 237-238). It noted that the DOT regulations require that the "'maximum feasible portion'" of a recipient's overall annual DBE participation goal be met with "race-neutral means," allow set-aside contracts only "when no other method could be reasonably expected to redress egregious instances of discrimination," and prohibit the use of quotas. *Id.* at 10a.

It also stressed that the current DBE regulations provide "substantial flexibility," 03-960 Pet. App. 11a, because a recipient of federal funds may seek waivers or exemptions from many of the regulatory requirements, may not be penalized for failing to meet an overall annual DBE participation goal as long as it exercises good faith, and must terminate use of race- or gender-based efforts when its goal can be met entirely through race- or gender-neutral means, *id.* at 10a-11a. The court of appeals also noted that an individual owner who has a net worth that exceeds $750,000 (excluding the individual's ownership in the applicant DBE firm and the individual's equity in his or her primary residence) cannot qualify as economically disadvantaged, *id.* at 11a, and stated that because TEA-21 is set to expire and requires congressional reauthorization for its continued operation, "the DBE program contains built-in durational limits," *ibid.*; see 49 C.F.R. 26.67(a)(2)(i) and (iii).

The court also underscored the importance of DOT's requirement that a recipient's DBE participation goals be tied to the relevant local market. 03-960 Pet. App. 11a-12a. It explained that, "in stark contrast" to the program struck down in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), DOT's regulations require "realistic goals for DBE participation" based on demonstrable evidence of local market conditions. 03-960 Pet. App. 12a. The court of appeals further noted that the

DOT regulations expressly declare that TEA-21's "statutory ten percent provision 'is an aspirational goal at a national level,' not a mandatory requirement for grantee States." *Id.* at 10a (quoting 49 C.F.R. 26.41(b)).

Relying on this Court's decisions applying strict scrutiny, the court of appeals explained that both "Congress and DOT have taken significant steps to minimize the race-based nature of the DBE program." 03-960 Pet. App. 12a. It explained that because the federal regulations create a rebuttable presumption of social and economic disadvantage, exclude firms owned by wealthy minorities, and allow individuals not deemed presumptively disadvantaged to demonstrate actual social and economic hardship, "race is made relevant in the program, but it is not a determinative factor," *ibid.* (citing *Grutter* v. *Bollinger*, 123 S. Ct. 2325, 2345-2346 (2003), and *Gratz* v. *Bollinger*, 123 S. Ct. 2411, 2429 (2003)).

Finally, the court of appeals held that both Nebraska and Minnesota had constitutionally implemented the federal DBE program. 03-960 Pet. App. 13a-14a. The court concluded that both States had satisfied DOT's regulatory requirement that its program be "demonstrably needed" by complying with federal regulations that require DBE participation goals to be based on "demonstrable evidence" reflecting the local level of DBE participation expected in the absence of discrimination, adjusted to account for the maximum portion of the goal that can be achieved through race-neutral means. *Id.* at 9a, 11a, 14a, 15a-16a. The court also concluded that petitioners "failed to prove that the revised DBE program is not narrowly tailored" as applied to their respective States. *Id.* at 13a, 14a.

ARGUMENT

This Court's review of the questions presented is not warranted at this time. In *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995) (*Adarand I*), this Court held that all race-conscious measures are subject to strict scrutiny. Since that decision, two federal courts of appeals and five district courts have reviewed TEA-21 and DOT's DBE regulations under strict scrutiny. Each of those courts has come to the same conclusion—that the record before Congress was, and remains, sufficient to permit Congress to enact a race- and gender-conscious DBE contracting program, and that DOT's extensive regulations, on their face, are narrowly tailored to achieve Congress's compelling remedial purposes. Indeed, DOT promulgated the current regulations and extensively altered the federal DBE program following this Court's decision in *Adarand I*, precisely to help ensure compliance with the strict scrutiny standard. The court of appeals correctly applied that exacting standard and concluded that the federal DBE program, and Nebraska's and Minnesota's implementation of that program, are constitutional. Because that decision is correct and does not conflict with any decision of this Court or of any other court of appeals, the petitions for a writ of certiorari should be denied.

1. Petitioners make a number of contentions about the adequacy of the record before Congress. 03-960 Pet. 17-20; 03-968 Pet. 5-10. None has merit or otherwise justifies this Court's review.

a. First, petitioners contend (03-960 Pet. 17-20; 03-968 Pet. 5-10) that the court of appeals erroneously held that Congress had a "strong basis in evidence" to support its conclusion that race-based remedial action was necessary. Petitioners argue that the court of appeals

did not undertake the detailed, skeptical analysis of the legislative record that strict scrutiny requires. As the court of appeals itself made clear, petitioners are mistaken.

After stating that petitioners argued for "a de novo review of this legislative record," the court of appeals stated that "[w]e agree we must take a hard look at the evidence, *and we have done so.*" 03-960 Pet. App. 7a (emphasis added). Many of the hearings, debates, and reports that are part of the legislative record compiled by Congress during the three decades in which it has been considering these types of contracting programs were included in the record before the court of appeals. The court discussed this extensive record and concluded that it satisfied the government's burden of showing "a strong basis in * * * evidence to support its conclusion that race-based measures were necessary." *Ibid.*

Petitioners' assertions that the court of appeals' conclusion was "based entirely on the Tenth Circuit's opinion in *Adarand II*" and that the court placed too much emphasis on the *Appendix*, 61 Fed. Reg. at 26,050 (03-960 Pet. 17, 18; see 03-968 Pet. 7-10) are equally mistaken. The court below merely stated that, after undertaking its own "hard look" at the extensive legislative record, it agreed with the Tenth Circuit's conclusion in *Adarand II* that that record was sufficient. 03-960 Pet App. 7a. That statement hardly indicates that the court of appeals here relied exclusively on the Tenth Circuit's decision or failed to conduct its own review of the legislative record. Nor is there any basis to conclude that the court of appeals placed too much emphasis on the *Appendix* document referenced by petitioners. Rather, the court examined the entirety of the legislative record, which "Congress * * * spent

decades compiling," *ibid.*, and concluded that it established a strong basis in evidence of the need for a race-conscious DBE program.

Accordingly, the issue of the level of review courts should give the legislative record is not presented in these cases, because the court of appeals expressly stated that it gave the record an appropriately careful review and nonetheless found the record sufficient. This Court initially granted review in *Adarand II* to consider whether the Tenth Circuit "misapplied strict scrutiny" by "applying a far more lenient standard to acts of Congress * * * than actions of state and local governments," see Pet. 5, *Adarand II*, *supra* (No. 00-730). Here, in contrast, the court of appeals specifically stated that it "t[ook] a hard look at the evidence," 03-960 Pet. App. 7a, and gave no indication whatsoever that it was applying a lenient standard or otherwise improperly deferring to Congress's findings. Thus, no question about the standard applied by the court of appeals is presented here, and petitioners' repeated attacks on the Tenth Circuit's decision in *Adarand II* are entirely misplaced.

b. Because these cases do not present the issue of whether the court of appeals applied the wrong legal standard in assessing the legislative record, all that remains is the question whether the court of appeals reached the proper conclusion about whether Congress had a strong basis in evidence to support its enactment of TEA-21. That inherently fact- intensive question is not the sort of issue that generally warrants this Court's review. See *United States* v. *Doe*, 465 U.S. 605, 614 (1984).

In any event, the court of appeals' decision as to the sufficiency of the record before Congress is correct and in accord with the decisions of every other federal court

to consider the question. The record before Congress amply demonstrated a "strong basis in evidence" to support the enactment of the DBE provision in TEA-21 and DOT's DBE regulations, which authorize the use of race-conscious contracting preferences in jurisdictions where their use is manifestly necessary to remedy the effects of identified local discrimination. As summarized above, see pp. 3-5, *supra*, it includes evidence that decades of private and, at times, governmental discrimination have combined to continue to depress the opportunities for firms owned by socially and economically disadvantaged persons to compete on a discrimination-free basis for federally-supported highway construction contracts throughout the United States. The record also contains evidence of intentional discrimination on the basis of race, as well as evidence that discrimination in securing capital and other resources had affected minority and female business owners. See, *e.g.*, C. Grown & T. Bates, *Commercial Bank Lending Practices and the Development of Black Owned Construction Companies*, 14 J. Urb. Aff. 25-26, 39 (1992) (discussed by Rep. Norton, 144 Cong. Rec. at 10,656-10,657). Such discrimination raised costs for these firms, and in some instances simply made competing for contracts impossible. The use of "old boy networks," in some instances based on race or gender, often deprived newly formed minority businesses of the opportunity to bid on contracts and subcontracts. The evidence also shows that prime contractors would engage in bid shopping, and would allow their preferred subcontractors to match or better bids previously made by potential minority subcontractors. And there was evidence that black, Hispanic, Asian, and Native-American-owned businesses were underutilized in government contracts. See, *e.g.*, M. Enchautegui et al., *Do Minor-*

ity-Owned Businesses Get a Fair Share of Government Contracts? 11, 14-15, 19-22, 36, 61 (1997) (*Urban Inst. Rep.*) (discussed by Rep. Norton, 144 Cong. Rec. at 10,657-10,658).

Congress, moreover, relied on a wide-range of evidence, including statistical studies demonstrating varying levels of disparities in the utilization between minority- and non-minority-owned firms. See note 4, *supra*. As this Court stated in *Croson*, Congress has the authority to ensure that the federal government does not become a "passive participant" in private racial discrimination, and "[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that all public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evils of private prejudice." 488 U.S. at 492. There was ample evidence within the legislative record for the court of appeals to conclude that, absent TEA-21 and its accompanying regulations, Congress would become exactly that passive participant, extending the effects of private racial and gender discrimination. See *Nevada Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 729-736 (2003) (holding that Congress's findings of gender discrimination were sufficient to support the Family and Medical Leave Act of 1993). And petitioner failed below, and fails here, to identify specific evidence in the record that is unreliable, or to explain how the legislative record is inadequate.[5]

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[5] Petitioners' reliance (03-960 Pet. 19; 03-968 Pet. 7) on a United States General Accounting Office Report to attack the use of disparity studies is unavailing. *GAO-01-586, Disadvantaged Business Enterprises* (June 2001) (*GAO Report*). This Court has repeatedly recognized that disparity studies can be relevant and probative of whether there is sufficiently strong evidence to demonstrate a compelling interest in remedial action. See *Croson*, 488 U.S. at

c. Equally important, the court of appeals' decision is consistent with every other federal appellate or district court decision analyzing the TEA-21 program. Every federal court that has considered whether TEA-21's legislative record is sufficient to uphold the statute's facial constitutionality has applied strict scrutiny and concluded that Congress had "a strong basis" in evidence to support its conclusion that remedial relief was necessary. See 03-960 Pet App. 7a (8th Cir.); *id.* at 24a (D. Neb.); 03-968 Pet. App. 26a-29a (D. Minn.); *Adarand II*, 228 F.3d at 1167-1176 (10th Cir.), aff'g 965 F. Supp. 1556, 1570-1577 (D. Colo. 1997)); *Western States Paving Co.* v. *Washington Dep't of Transp.*, No. C00-5204 RBL (W.D. Wash. Sept. 3, 2003), appeal pending, No. 03-35783 (9th Cir.); *Northern Contracting, Inc.* v. *State*, No. 00-C-4515, 2004 WL 422704 (N.D. Ill. Mar. 3, 2004). The consistent results reached by the federal courts of appeals and district courts that have reviewed the legislative record strongly suggest that this Court need not grant review in this case.[6]

503; *id.* at 509. Moreover, petitioners' reliance on the GAO Report to suggest that the court of appeals erroneously concluded that Congress had a compelling interest is misplaced, since the GAO Report expressly provides that its purpose "was not to address the question of whether the DBE program satisfies the requirements of strict scrutiny," *GAO Report* 82, and in fact reviewed only 14 such disparity studies.

[6] Cf. *Cortez* v. *NASA*, 950 F. Supp. 357 (D.D.C. 1996) (discussing whether Congress had a compelling interest supporting the Small Business Act and the SBA's race-conscious 8(a) contracting program); *id.* at 361 ("Congress first implemented the Small Business Act to combat serious unlawful discrimination in government contracting. In oversight and reauthorization hearings held since implementation of the act, Congress has continued to find such discrimination.").

Petitioner Gross Seed incorrectly asserts (03-960 Pet. 23-25) that the court of appeals decision conflicts with the Federal Circuit's decision in *Rothe Development Corp.* v. *United States Department of Defense*, 262 F.3d 1306 (2001). In *Rothe*, the Federal Circuit reversed a decision upholding the constitutionality of a federal defense contracting program that operated by increasing the bid of a non-minority-owned firm by up to ten percent. It held that the "district court improperly applied a deferential legal standard rather than 'strict scrutiny,' and impermissibly relied on post-reauthorization evidence to support the program's constitutionality as reauthorized." *Id.* at 1312. Because the court of appeals here applied strict scrutiny, did not defer to Congress, and considered only evidence that was in the legislative record when Congress enacted TEA-21, its decision does not conflict with *Rothe*.

2. This Court should not grant review of petitioners' claim (see, *e.g.*, 03-960 Pet. 20-22) that Congress lacked authority to enact TEA-21 because it did not have evidence of past discrimination in the construction industry in each of the 50 States. That claim is inconsistent with this Court's precedent and, if upheld, would seriously compromise Congress's authority to carry out its fundamental purpose to enact legislation to remedy problems that affect the Nation as a whole. Cf. *Hibbs*, 538 U.S. at 734-735.

To the extent petitioners assert that Congress may not enact even narrowly-tailored legislation—legislation that authorizes and requires a race-conscious remedy only in those local jurisdictions where there is discrimination (or its effects) that cannot otherwise be remedied—unless it first finds discrimination in every State, its contention is plainly without merit. Indeed, as this Court has explained, while a state or local

government has only "the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," Congress has the power to ensure that federal spending does not reinforce discrimination in locations where federal dollars are spent. *Croson*, 488 U.S. at 490-492 (plurality opinion); see *Oregon* v. *Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring); see also *Hibbs*, 538 U.S. at 734 (observing that Congress can look to evidence of inadequate leave policies nationwide in reaching conclusion about need for legislation, "no matter how generous" any one State's policies may have been).[7]

In any event, even though TEA-21 is national in scope, DOT's DBE regulations, if properly implemented, minimize the danger that state race-conscious DBE programs will be used where there is an absence of discriminatory effects that cannot be remedied through race- or gender-neutral means. As the court of appeals explained, "a valid race-based program must be narrowly tailored, and to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed." 03-960 Pet. App. 8a-9a. Since the DOT

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[7] Contrary to petitioner Gross Seed's claim (03-960 Pet. 24), the Federal Circuit's *Rothe* decision does not suggest that the court of appeals applied a "watered-down version of strict scrutiny" because it approved of TEA-21's DBE program without evidence as to its necessity in every State. In fact, *Rothe* says precisely the opposite. *Rothe*, 262 F.3d at 1329 (explaining that "[w]hereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, we do not think that Congress needs to have had evidence before it of discrimination in all fifty states in order to justify a race-conscious remedy"); see also *id.* at 1321 n.14 (noting that even under strict scrutiny Congress is entitled to deference in its factfinding).

regulations require that DBE participation goals be tied to local market conditions, they help to ensure that a State's implementation of the program depends on the circumstances in that jurisdiction, not in other parts of the country. In addition, the regulations allow waivers and exemptions in certain circumstances, contain exceptions from meeting overall DBE participation goals if there is a good-faith effort at compliance, and bar the use of race-conscious measures when full DBE participation in that State, again based on local assessments, can be achieved through race-neutral means. See pp. 7-8, *supra*. As a result, the statutory and regulatory provisions, taken together, are designed to assist States and other recipients of federal funds in determining when, *if at all*, targeted race-conscious remedial contracting measures are manifestly necessary to overcome the effects of discrimination in a particular jurisdiction. It is *only* in those circumstances, and in particular where it is clear that race-neutral measures are insufficient to overcome the effects of discrimination, that the federal DBE regulations permit fund recipients to adopt limited race-conscious remedies.

3. With respect to their claims regarding narrow tailoring, petitioners have presented no argument and cited no case law demonstrating that any portion of DOT's regulations is facially defective or incapable of constitutional implementation. Further, because petitioners did not establish below that there is no set of circumstances in which the regulations can be constitutionally applied, the question whether the regulations are narrowly tailored on their face is not presented. See *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 797-798 (1984); *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).

As the court of appeals noted (03-960 Pet. App. 9a-12a), DOT's DBE regulations satisfy this Court's requirement that the remedial use of race be narrowly tailored. The regulations limit the benefits of race-conscious remedies to those individuals who are considered socially and economically disadvantaged as defined in the regulations, and require recipients to set numerical DBE participation goals based on localized assessments of DBE availability and the DBE utilization expected in the absence of discrimination, thereby limiting the burden on non-minorities. The regulations also require that race-conscious contracting remedies be used only where there is demonstrable local evidence showing less than full DBE participation compared to what would be expected in the absence of discrimination, and even then only a determination that race-neutral efforts will be ineffective at achieving the overall DBE participation goal. Furthermore, the use of race-conscious contracting remedies in DBE programs authorized by TEA-21 and DOT regulations is of limited duration, because TEA-21 must be reauthorized (or further extended) to extend beyond April 30, 2004. See note 2, *supra*. Moreover, DOT's regulations require termination of the use of race- conscious measures in any jurisdiction where race-neutral measures are adequate to meet DBE participation levels expected in the absence of discrimination. Thus, on their face, DOT's regulations satisfy this Court's precedent describing the requirements of narrow tailoring. See, *e.g.*, *United States* v. *Paradise*, 480 U.S. 149 (1987); *Grutter* v. *Bollinger*, 123 S. Ct. 2325, 2342-2346 (2003); see also 64 Fed. Reg. 5096, 5102-5103 (1999).[8]

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[8] Petitioner Sherbrooke Turf also argues that the federal DBE program violates Section 5 of the Fourteenth Amendment and

4. Petitioners also argue (03-960 Pet. 22; 03-968 Pet. 20- 23) that the court of appeals erred in finding that Nebraska's and Minnesota's implementation of the federal DBE program are narrowly tailored. Petitioner Gross Seed, for example, asserts that the court "placed great weight on the fact" that Nebraska set its overall DBE participation goals in accordance with a study that "did not purport to[] prove discrimination against DBEs." 03-960 Pet. 22.

The question whether Nebraska or Minnesota has implemented the federal DBE program in a manner consistent with constitutional requirements is a fact-intensive inquiry that does not warrant this Court's review. Because each State, pursuant to DOT's regulations, adopts and implements its own individualized DBE program, tailored to conditions within its jurisdiction, a decision by this Court as to the constitutionality of Nebraska's or Minnesota's program will have little applicability to other jurisdictions.

In any event, the court of appeals correctly concluded that Nebraska's and Minnesota's DBE programs are sufficiently narrowly tailored. Though not dispositive on the constitutional questions, DOT found that those programs complied with federal DBE regulations that are designed to help narrowly tailor implementation of the federal DBE program by assisting States in determining when, if at all, race-conscious contracting preferences are manifestly necessary to remedy the effects of discrimination in a particular jurisdiction. For ex-

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impermissibly intrudes on matters reserved to the States. See 03-968 Pet. 6, 24-26. The federal DBE program, however, was enacted pursuant to Congress's authority under the Spending Clause, not the Fourteenth Amendment, and there is no justification for importing the fundamentally different standard for determining the constitutionality of Section 5 enactments to this case.

ample, both Nebraska and Minnesota analyzed local market conditions and set their annual DBE participation goals in 2000 and 2001 based on data that compared the availability and utilization of DBEs and took account of DBE participation that could be achieved through race-neutral means. 03-960 Pet. App. 14a; 03-968 Pet. App. 15a-16a. DOT reviewed the States' goal-setting methodology and determined that it complied with DOT's regulations.[9]

5. Petitioner Gross Seed argues (03-960 Pet. 14-17) that this Court should review the court of appeals' decision because it previously agreed to review the Tenth Circuit's decision in *Adarand II*, which, petitioner asserts, presented "the same important questions" raised in these cases. *Id.* at 5. Petitioner's reliance on this Court's prior grant of plenary review is misplaced. While both *Adarand II* and these cases involve elements of DOT's DBE regulations, there are important differences between the issues presented to this Court then and now.

The first Question Presented in *Adarand II*, for example, related to whether the court of appeals had

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[9] As it did in the court of appeals, petitioner Sherbrooke Turf relies on statements by various state employees that they personally were not aware of specific incidences of discrimination in highway construction in Minnesota to assert that there is no evidence of discrimination in Minnesota to support using race-conscious DBE goals. 03-968 Pet. 19. Petitioner, however, conceded at oral argument in the district court that the state employees merely stated that they did not know of any instances of discrimination and that "[t]hey did not say there isn't" any discrimination in Minnesota. Supp. Pet. App., Tab 1, Tr. 71. Thus, even according to petitioner, the state employees' statements, taken in the light most favorable to petitioner, do not cast doubt on the evidence relied upon by MNDOT to justify its race-conscious, remedial contracting goals.

"misapplied the strict scrutiny standard in determining if Congress had a compelling interest" to enact TEA-21. 00-730 Pet. at I. As explained above (at p. 18, *supra*), that question is not presented here. The *Adarand II* petition (00-730 Pet. at 6) alleged that the Tenth Circuit had improperly deferred to Congress and had "failed to demand a strong basis in evidence to support a compelling governmental interest." In contrast, the court of appeals here specifically stated that it took a "hard look" at the entire legislative record in determining whether Congress had a strong basis in evidence to demonstrate a compelling governmental interest. 03-960 Pet. App. 7a. In other words, the court of appeals here made clear that it gave the legislative record precisely the level of review that the petitioner in *Adarand II* alleged that the Tenth Circuit failed to provide.

The second Question Presented in *Adarand II* was "[w]hether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored." 532 U.S. 968 (2001). Although that question is also presented in these cases, the circumstances surrounding that issue have changed substantially since this Court's decision to grant review in *Adarand II*. The Tenth Circuit, when deciding *Adarand II*, was faced with the problem that the federal DBE regulations had been changed during the litigation itself. While the initial contract dispute occurred under old regulations, DOT promulgated its new regulations before the case returned for the second time to the Tenth Circuit. Indeed, the Tenth Circuit held that the federal DBE program under DOT's old regulations was unconstitutional, while the new regulations adequately addressed those constitutional infirmities. See 228 F.3d at 1176-1187.

The potential for uncertainty regarding DOT's regulations in the Tenth Circuit's decision has been substantially lessened by subsequent litigation. As stated above, each federal district court and court of appeals to examine the constitutionality of DOT's regulations has held that, on their face, the new regulations narrowly tailor the use of race and gender-based contracting remedies authorized by TEA-21. The more recent litigation, and the consistency of federal court decisions as to the DOT regulations, make plenary review of the second and final issue presented in *Adarand* three years ago unnecessary.

In sum, the fact that this Court granted plenary review in *Adarand II* does not compel a similar grant today. Cf. *Concrete Works of Colorado, Inc.* v. *City of Denver*, 124 S. Ct. 556 (2003) (Scalia, J., dissenting from the denial of cert.). Federal courts are carefully scrutinizing the legislative record, and are unanimously and consistently finding that Congress had a strong basis in evidence on which to conclude that a narrowly-tailored use of race-conscious contracting remedies is permissible. Moreover, as revealed by the consistent decisions of federal courts, DOT's regulations are, on their face, narrowly tailored and can be implemented by federal funding recipients in a constitutional manner. While the legal issues that govern the use of race-based contracting preferences were perhaps unclear when this Court granted review in *Adarand II*, both because the application of strict scrutiny to the federal government's use of race-conscious actions was relatively new, see *Adarand I*, *supra*, and because the ongoing modifications of the DOT regulatory scheme were confusing, federal courts, as of now, demonstrate neither confusion nor uncertainty when reviewing the facial constitutionality of TEA-21 and the DOT DBE regulations.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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